



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Judging the Judges

Citation for published version:

Harrison, J 2009, 'Judging the Judges: The New Scheme for Judicial Conduct and Discipline in Scotland', *Edinburgh Law Review*, vol. 13, no. 3, pp. 427-44. <https://doi.org/10.3366/E1364980909000572>

Digital Object Identifier (DOI):

[10.3366/E1364980909000572](https://doi.org/10.3366/E1364980909000572)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Edinburgh Law Review

Publisher Rights Statement:

© Edinburgh University Press. Harrison, J. (2009), Judging the Judges: The New Scheme for Judicial Conduct and Discipline in Scotland, *Edinburgh Law Review* 13(3), pp 427-444. DOI 10.3366/E1364980909000572. Originally published online: <http://www.eupublishing.com/doi/abs/10.3366/E1364980909000572>

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Judging the Judges: the New Scheme of Judicial Conduct and Discipline in Scotland

James Harrison[☆]

- A. INTRODUCTION
- B. INDEPENDENCE AND ACCOUNTABILITY
- C. THE NEW STATUTORY SCHEME
- D. DISCIPLINARY POWERS OF THE LORD PRESIDENT
- E. THE JUDICIAL COMPLAINTS REVIEWER
 - (1) Introduction
 - (2) Functions
 - (3) Independence
- F. SUBSTANTIVE RULES OF JUDICIAL CONDUCT?
- G. CONCLUSION

A. INTRODUCTION

The past decade has seen some highly significant constitutional developments in the United Kingdom. One aspect of these changes has been to confer a central role on the judiciary to police the new constitutional settlement, in particular in relation to human rights and devolution. Partly as a consequence of these reforms, the constitutional position of the judiciary has come under increasing scrutiny and there has been a notable trend towards the formalisation of the relationship between the judiciary and other branches of government. This is illustrated in England and Wales by the “Concordat” which sets out the division of responsibilities between the Lord Chancellor and the Lord Chief Justice in relation to the administration of justice.¹ The Concordat was followed by

[☆] Lecturer, University of Edinburgh.

¹ The Concordat is reproduced as Appendix 6 of the Select Committee Report on the *Constitutional Reform Bill*, HL Paper 125-I (2004), and is also available at <http://www.dca.gov.uk/consult/lcoffice/judiciary.htm>. The House of Lords Select Committee on the Constitution has since

the Constitutional Reform Act 2005 which incorporated many aspects of the relationship between the judiciary and the executive into statute. The Judiciary and Courts (Scotland) Act 2008² can be seen as a reflection of this trend in the Scottish context.

The Cabinet Secretary for Justice, Kenny MacAskill, hailed the 2008 Act as “an important constitutional measure that provides a rare opportunity to refresh the relationship between the judicial, legislative and executive arms of government”.³ When it comes fully into force, the Act will make considerable changes to the Scottish judicial system.⁴ In particular, the Act enshrines the independence of the judiciary in statute⁵ and unifies it under the leadership of the Lord President of the Court of Session.⁶ Amongst the many innovative aspects of the Act is the creation of a new scheme of judicial conduct and discipline. Except in relation to the removal of judges from office,⁷ this is the first time that judicial discipline has been dealt with by statute. The provisions increase the accountability of judicial office holders by making disciplinary processes more transparent than in the past. At the same time, they raise questions about how to balance accountability against the principle of judicial independence. The purpose of this article is to analyse how these values are reflected in the 2008 Act in the context of judicial conduct and discipline and to ask whether an appropriate balance has been struck. The analysis will also consider how the Scottish provisions compare with

called on the government and the judiciary to “establish a practice of amending the Concordat whenever necessary to ensure that it remains a living document reflecting current arrangements rather than being merely a historic document recording the outcome of negotiations in 2005”: see *Relations between the executive, the judiciary and Parliament: Follow-up Report*, 11th Report of Session 2007-08, HL Paper 177 (2008) (available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/177/177.pdf>) para 14.

² Asp 6. The Bill was passed by the Scottish Parliament on 25 Sept 2008 and received Royal Assent on 29 Oct 2008.

³ Scottish Parliament, *Official Report* col 11270 (25 Sept 2008).

⁴ Important parts of the Act are already in force, including the guarantee of judicial independence (s 1) and the provisions in respect of judicial appointments (ss 9-26): see Judiciary and Courts (Scotland) Act 2008 (Commencement No 1) Order 2009, SSI 2009/83; Judiciary and Courts (Scotland) Act 2008 (Commencement No 2) Order 2009, SSI 2009/192. However, the provisions on judicial conduct and discipline (ss 28-43), with which this article is mainly concerned, are not yet in force.

⁵ 2008 Act s 1.

⁶ 2008 Act s 2.

⁷ The removal of Court of Session judges is governed by the Scotland Act 1998 s 95 and the Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999, SI 1999/1017. This latter instrument will be repealed and replaced by the 2008 Act ss 35-39 and 73. Removal of sheriffs is governed by the Sheriff Courts (Scotland) Act 1971 s 12. This section will be substituted by the provisions found in the 2008 Act s 40. The removal of justices of the peace is covered in part by the Criminal Proceedings etc (Reform) (Scotland) Act 2007 s 71.

developments in England and Wales where a scheme of judicial discipline was introduced by the Constitutional Reform Act 2005.⁸

B. INDEPENDENCE AND ACCOUNTABILITY

The regulation of judicial discipline has at its heart two countervailing constitutional values. On the one hand, as public servants, judges are expected to act according to certain standards of conduct. Le Sueur notes that “a mature democracy requires those who exercise power to hold themselves open to account. Judicial power ought not to be excluded from accountability requirements.”⁹ On the other hand, the principle of judicial independence requires that judges should be isolated from interference by other branches of government.¹⁰

Clearly, the principle of judicial independence limits the types of action that can be taken against the judiciary. In relation to removing judges from office, statutory safeguards already seek to ensure that dismissal cannot be achieved too easily.¹¹ As stated by Lord Sutherland in *Clancy v Caird*, “[t]he most basic requirement for independence is security of tenure such as to provide a guarantee against any interference with the judge’s function from any outside source and in particular from the Executive”.¹²

The principle of judicial independence also limits the type of action that can be taken against a judge who has acted in a way that, although not serious enough to merit dismissal, is nevertheless considered to be unacceptable. In this context, judicial independence demands that judges are not subject to discipline by other branches of government. It does not follow, however, that the judiciary should not be subject to any form of external oversight. Judicial independence and accountability are not diametrically opposed.¹³ Bogdanor makes a useful distinction between “sacrificial” and “explanatory” accountability.¹⁴ Sacrificial

8 Constitutional Reform Act 2005 ss 108-119. See also the Judicial Discipline (Prescribed Procedures) Regulations 2006, SI 2006/676, as amended by the Judicial Discipline (Prescribed Procedures) (Amendment) Regulations 2008, SI 2008/2098.

9 A Le Sueur, “Developing mechanisms for judicial accountability in the UK” (2004) 24 Legal Studies 73 at 74.

10 The principle of judicial independence is now codified in s 1 of the 2008 Act. See also Constitutional Reform Act 2005 ss 3, 4.

11 See n 7 above.

12 *Clancy v Caird* (No 2) 2000 SC 441 at 447.

13 See F Contini and R Mohr, “Reconciling independence and accountability in judicial systems” (2007) 3 Utrecht L Rev 26.

14 V Bogdanor, “Parliament and the judiciary: the problem of accountability” (2006 Sunningdale Lecture, available at http://www.ukpac.org/bogdanor_speech.htm). See also S C Styles, “The Scottish judiciary”, in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006) 174 at 190-193.

accountability dictates that one institution is subject to the *control* of another. Explanatory accountability, on the other hand, simply involves the *scrutiny* of an institution by another body. In other words, explanatory accountability seeks to increase transparency in the exercise of public powers.

Transparency is an important value in the modern constitutional practice of the United Kingdom. Openness was one of the seven principles of public life espoused by Lord Nolan and his Committee on Standards in Public Life:¹⁵

[H]olders of public office should be as open as possible about all decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands it.

This principle has been implemented in relation to other branches of government through legislation such as the Freedom of Information (Scotland) Act 2002. The principle of transparency has also been acknowledged in a number of judicial decisions. For instance, in *R v Home Secretary ex p Doody*, Lord Mustill referred to “the continuing momentum . . . towards openness of decision-making”¹⁶ and “a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon ‘transparency’, in the making of administrative decisions”.¹⁷

Whilst the judiciary has been a catalyst for transparency in respect of other branches of government, it has resisted the imposition of standards of transparency to its own practices, including the system for judicial discipline. A contrast can be drawn with other Commonwealth jurisdictions which adopted statutory schemes of judicial conduct and discipline much earlier.¹⁸ For instance, Canada introduced a scheme for investigation into the conduct of federal judges as long ago as 1971.¹⁹ In the United Kingdom it was not until 2005 that a scheme of judicial discipline was first enacted, in the Constitutional Reform Act. That scheme only applies to judicial office holders in England and Wales and to certain tribunal members who sit in Scotland. Following this lead, the Scottish administration began to consider whether or not similar reform was necessary in Scotland.

15 *Standards in public life: first report of the Committee on Standards in Public Life* (Cm 2850: 1995) 14.

16 [1994] 1 AC 531 at 564.

17 At 560. See also e.g. *R(L) v Secretary of State for the Home Department* [2008] 1 WLR 158 at para 35 per Waller LJ citing *Jordan v United Kingdom* (2001) 37 EHRR 52 at para 109 (“there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory”).

18 See the research commissioned by the Scottish Government in this regard: J Chalmers, *Matters of Judicial Appointments, Conduct and Removals in Commonwealth Jurisdictions* (2008, available at <http://www.scotland.gov.uk/Publications/2008/01/04135549/0>).

19 Judges Act 1971.

Prior to the enactment of the 2008 Act, the disciplining of Scottish judges, falling short of removal from office, was a matter for the judiciary itself. Generally speaking, the Lord President was responsible for the conduct of judges of the Supreme Court and the sheriffs principal for sheriffs in their sheriffdoms. There was no formal framework within which investigations had to be carried out and matters were largely dealt with on an informal basis. As a consequence, members of the public knew little about the operation of the scheme for judicial conduct and discipline. It was not only the practical operation of the system that was puzzling to the observer, but also how to access the system in the first place. There was no clear information available about how to make complaints about judicial conduct. Nor was there any information about how complaints were dealt with. Indeed, there were no publicly available statistics concerning the number or types of complaints which had been lodged against the judiciary.²⁰

For many, this was not seen as a satisfactory state of affairs. It was argued in the Policy Memorandum accompanying the Judiciary and Courts (Scotland) Bill that “the absence of any process for considering an occasion when judicial conduct might fall short of the reasonable expectations of those who use the courts is inconsistent with modern day standards”.²¹ This view was shared by other political parties in the Scottish Parliament. Despite serious reservations from the judiciary itself,²² the Justice Committee concluded in its Stage 1 Report on the Bill that “it is imperative that there is a formal complaints process”.²³

C. THE NEW STATUTORY SCHEME

Under the 2008 Act, judicial discipline continues to be a matter for the judiciary. It is one of the responsibilities of the Lord President, in his new role as the Head of the Scottish Judiciary, to make and maintain appropriate arrangements for “the investigation and determination of any matter concerning the conduct of judicial office holders and the review of such determinations”.²⁴ The judicial

20 Even the Scottish Government did not seem to maintain records on a systematic basis: see Scottish Parliament, *Official Report*, Justice Committee, col 698 (25 March 2008, Cabinet Secretary for Justice).

21 Policy Memorandum on the *Judiciary and Courts (Scotland) Bill* (2008, available at <http://www.scottish.parliament.uk/S3/bills/06-JudiciaryCourts/b6s3-introd-pm.pdf>) para 82. See also Scottish Government, *Strengthening Judicial Independence in a Modern Scotland* (2006, available at <http://www.scotland.gov.uk/Publications/2006/01/30154152/0>) para 8.18.

22 See e.g. Scottish Parliament, *Official Report*, Justice Committee, col 579 (11 March 2008, Lord President Hamilton); J McCluskey, “Unnecessary and misconceived: some reflections on the Judiciary and Courts (Scotland) Bill” (2008) 12 *EdinLR* 288 at 293.

23 Justice Committee, Stage 1 Report on the *Judiciary and Courts (Scotland) Bill* (2008: SP Paper 91, available at <http://www.scottish.parliament.uk/S3/committees/justice/reports-08/jur08-11-01.htm>) para 182.

24 Judiciary and Courts (Scotland) Act 2008 s 2(2)(e).

office holders who fall under the responsibility of the Lord President in this regard include not only Court of Session judges, but also the Chairman of the Scottish Land Court, temporary judges, sheriffs principal, sheriffs, justices of the peace, and stipendiary magistrates.²⁵ It does not, on the other hand, include Scottish members of administrative tribunals.²⁶

The responsibility of the Lord President is further elaborated in section 28 of the Act, which confers a power to make rules for or in connection with investigations into judicial conduct. Examples of issues with which such rules may deal are set out in section 28(2):

- (a) circumstances in which an investigation must or may be undertaken,
- (b) the making of complaints,
- (c) steps to be taken by a complainant before a complaint is to be investigated,
- (d) the conduct of an investigation (including in particular steps to be taken by the office holder under investigation or by a complainant or other person),
- (e) time limits for taking any step and procedures for extending time limits,
- (f) persons by whom an investigation or part of an investigation is to be conducted,
- (g) matters to be determined by the person conducting an investigation (or part of an investigation), the Lord President or any other person,
- (h) the making of recommendations by persons conducting investigations (or parts of investigations),
- (i) the obtaining of information relating to complaints,
- (j) the keeping of records of investigations,
- (k) confidentiality of communications or proceedings,
- (l) the publication of information or its provision to any person.

This list covers a wide range of matters, although it is neither mandatory nor exhaustive. Nevertheless, the provisions of section 28 give some clues about what a scheme of judicial discipline may look like in practice. First, the Act envisages a two-stage process which includes an initial investigation and then a possible review.²⁷ Secondly, it foresees that there may be threshold criteria which must be met before an investigation is to be undertaken,²⁸ including time-limits on making a complaint.²⁹ Different procedures may apply to different situations.³⁰ For instance, separate procedures may apply to Court of Session judges, to

²⁵ 2008 Act s 43.

²⁶ Some tribunal members are covered by the scheme of judicial conduct and discipline laid down in the Constitutional Reform Act 2005 ss 115 and 120. Reform of devolved tribunals is currently under consideration: see Scottish Consumer Council, *Options for the Future Administration and Supervision of Tribunals in Scotland* (2008), available at http://www.ajtc.gov.uk/docs/Tribunals_in_Scotland.pdf.

²⁷ 2008 Act s 28(1)(a), (b).

²⁸ 2008 Act s 28(2)(a), (c).

²⁹ 2008 Act s 28(2)(e).

³⁰ 2008 Act s 28(3)(a).

sheriffs, and to justices of the peace. Perhaps most importantly, whatever rules are prescribed “are to be published in such a manner as the Lord President may determine”.³¹ Whilst this gives a broad discretion over form, it imposes a duty to publish. For the first time, therefore, the procedures for the consideration of judicial complaints will be made public, significantly increasing the transparency of the process.

A striking feature is that the judiciary retains complete control over the content of the complaints procedure. While, however, it is appropriate, from the perspective of judicial independence, that the judiciary has an input into the design and operation of a system for judicial complaints, it can be asked whether it is necessary that the scheme should be developed without any contribution from other branches of government. In this regard, there is an important difference between the 2008 Act and the equivalent provisions for England and Wales in the Constitutional Reform Act 2005. As Head of the Judiciary of England and Wales, the Lord Chief Justice is empowered to prescribe regulations on judicial conduct, but only with the agreement of the Lord Chancellor (an office currently held by the Secretary of State for Justice).³² As stated in the Concordat which preceded the 2005 Act, “[t]he Lord Chief Justice and the Secretary of State are jointly responsible for operation of the complaints system.”³³ In other words, the procedures are the product of co-operation between the executive and judicial branches of government. This ensures that decisions over the content of the rules and procedures for the investigation of judicial conduct are not within the exclusive domain of the judiciary, thus promoting a degree of external scrutiny. This can be contrasted with the Scottish legislation, where the Lord President alone is responsible for prescribing the procedures on the investigation of judicial conduct, and there is no formal involvement of the Scottish Ministers either in the drafting of rules or in their adoption.³⁴ Nor are the rules subject to any form of parliamentary scrutiny. In contrast to England and Wales, where “[t]he Secretary of State is accountable to Parliament for the operation of the complaints and discipline system”,³⁵ it is not clear whether there can be any parliamentary accountability for the Scottish scheme, given that the Scottish Parliament is

31 2008 Act s 28(3)(b).

32 Constitutional Reform Act 2005 s 115.

33 Concordat (n 1) para 80.

34 Note, however, the Judicial Complaints Reviewer may make recommendations on the content of the prescribed procedures: see E.(2) below.

35 Concordat (n 1) para 80.

unable to order a judge of any court, including the Lord President, to attend its proceedings.³⁶

During the passage of the Bill there was some debate about whether the Lord President should have an absolute discretion over the content of the rules and procedures prescribed under section 28. Indeed, at Stage 2 an attempt was made to introduce an amendment which would have required the Lord President to include certain provisions in the prescribed procedures.³⁷ The amendment was resisted by the Cabinet Secretary for Justice who argued that it was “unnecessary and overly prescriptive”.³⁸ In his opinion, “the provisions in the bill strike the right balance between the Parliament requiring the judiciary to address the important issue and put in place a robust conduct scheme, and respecting its independence by leaving the detail of how the scheme will work for the Lord President to determine”. Yet this assertion seems open to doubt given the absolute discretion conferred on the Lord President.³⁹ In fact the inclusion of minimum standards in the legislation would not have been overly prescriptive or have necessarily encroached on judicial independence, but it would have increased public confidence in the procedures for the investigation of complaints against the judiciary. As it stands, the 2008 Act does very little to guarantee the creation of a robust system.

D. DISCIPLINARY POWERS OF THE LORD PRESIDENT

Another purpose of the 2008 Act is to clarify the disciplinary powers which the Lord President may wield in his capacity as Head of the Scottish Judiciary. As with the procedures which applied to investigations into judicial conduct, the disciplinary powers which were available prior to the Act were largely of an informal character.⁴⁰ The 2008 Act confers formal powers. Section 29(1) provides that, for disciplinary purposes, the Lord President may give to a judicial office

36 Scotland Act 1998 s 23(7)(a). It could be argued that this provision does not apply to the Lord President in relation to the non-judicial functions attributed to him or her under the 2008 Act. However, in contrast to the position of tribunal members, who are exempted from an order to attend parliamentary proceedings only “in connection with the discharge by him of his functions as such” (s 23(7)(b)), the exemption for judges would appear to be absolute.

37 Scottish Parliament, *Official Report*, Justice Committee, col 907 (10 June 2008). See also written submission from the Law Society for Scotland (available at <http://www.scottish.parliament.uk/s3/committees/justice/inquiries/JudiciaryBill/JC4.pdf>) 4.

38 Scottish Parliament, *Official Report*, Justice Committee, col 908 (10 June 2008).

39 Strictly speaking, the Act does not require the judiciary or the Lord President to do anything. Both sections 28 and 29 are drafted as *empowering* provisions.

40 Policy Memorandum (n 21) para 86.

holder (a) formal advice (b) a formal warning or (c) a reprimand.⁴¹ There is no explicit hierarchy among the three types of sanction and it could be asked whether there is any practical difference between them. These are not the only powers that can be exercised in a disciplinary context. First, the Act makes clear that the Lord President may continue to deal with individual cases informally when he sees fit.⁴² Secondly, the Lord President is given the power to suspend judicial office holders where “necessary for the purposes of maintaining public confidence in the judiciary”.⁴³ This is a broad power which will cover the situation where the conduct of a judicial office holder is found wanting as well as the situation where an investigation into that conduct is underway. Finally, in very serious circumstances the Lord President may request the establishment of a tribunal to consider the fitness for office of a judicial office holder.⁴⁴

Whilst there is an obligation to publish any rules and procedures issued in relation to the investigation of judicial conduct,⁴⁵ there is no corresponding duty on the Lord President to publish the outcome of an investigation once it has been concluded or an account of what disciplinary powers, if any, have been used. From the outset, it was maintained that “investigation of complaints would be confidential, and the outcome, while made known to the complainer, would not be the subject of any publicity except where the Lord President considered that it would be in the interests of the administration of justice for the outcome to be given some publicity”.⁴⁶ The Cabinet Secretary for Justice restated this view when the Bill was considered by the Justice Committee, giving the following reasons for not publishing the outcome of an investigation:⁴⁷

Third parties might be involved. Such evidence may relate to the conduct of a case, with the result that litigants could suffer unduly. There could be an impact on appeals. There could be a variety of consequences for people other than the judicial office holder who was under investigation. Litigants in a case that came before the judge could be affected.

In its final form, the Act leaves it to the discretion of the Lord President to decide on how to deal with confidentiality of proceedings and the publication

41 These powers may only be exercised when a person carrying out an investigation into judicial conduct has made a recommendation to that effect: see s 29(2).

42 Judiciary and Courts (Scotland) Act 2008 s 29(3)(a).

43 2008 Act s 34(1).

44 2008 Act s 35; Sheriff Courts (Scotland) Act 1971 s 12A, inserted by the 2008 Act s 40; Criminal Proceedings etc (Reform) (Scotland) Act 2007 s 71, as amended by the 2008 Act s 41.

45 See C above.

46 Scottish Executive, *Proposals for a Judiciary (Scotland) Bill* (2007, available at <http://www.scotland.gov.uk/Resource/Doc/165568/0045075.pdf>) 19.

47 Scottish Parliament, *Official Report*, Justice Committee, col 695 (25 March 2008).

of information or its provision to any person.⁴⁸ As a result, there is no guarantee of transparency concerning the actual operation of disciplinary procedures or the use of disciplinary powers in individual cases although, as will be seen below, some general information will be made public through the Judicial Complaints Reviewer.

E. THE JUDICIAL COMPLAINTS REVIEWER

(1) Introduction

It has been seen that the Lord President has a large degree of discretion in designing and operating the system for judicial complaints, with little involvement of other branches of government. However, the 2008 Act does create one potentially important oversight mechanism: the Judicial Complaints Reviewer.⁴⁹

The primary role of the Judicial Complaints Reviewer is to consider whether the procedures for investigating complaints against judicial office holders are operated fairly in respect both of the complainant and of the judicial office holder who is the subject of investigation. The functions to be performed by the Reviewer are similar to those associated with an ombudsman.⁵⁰ Indeed, the Judicial Complaints Reviewer was partly inspired by the Ombudsman for Judicial Appointments and Discipline appointed under the Constitutional Reform Act 2005 in order to review the exercise of disciplinary functions (among other matters) and to ensure that they are conducted in compliance with prescribed procedures.⁵¹ When it came to designing a similar scheme for Scotland it was argued that, given the size of the jurisdiction and the limited number of complaints that were anticipated, it would be disproportionately expensive to establish and maintain an independent ombudsman.⁵² In addition, the inclusion of judicial complaints within the mandate of the existing Scottish Public Services Ombudsman was rejected because it was considered that the judiciary “inhabits an entirely different spectrum from that which involves complaints about the council or the health board”.⁵³ Instead, a more informal arrangement was made.⁵⁴

48 2008 Act s 28(2)(k), (l).

49 2008 Act s 30.

50 See e.g. C Harlow and R Rawlings, *Law and Administration* (1997) ch 13.

51 Constitutional Reform Act 2005 ss 62, 110(1) and Sch 13. Section 101 also gives the Ombudsman a role in investigating complaints in connection with judicial appointments.

52 Policy Memorandum (n 21) para 90.

53 Scottish Parliament, *Official Report*, Justice Committee, col 696 (25 March 2008, Cabinet Secretary for Justice).

54 The role of the Judicial Complaints Reviewer draws inspiration from the process of reviewing appointments to Queen’s Counsel in Scotland: see Scottish Government, *Strengthening Judicial*

Thus, it is anticipated that the Judicial Complaints Reviewer will be a part-time position, employed for only a few days each month.⁵⁵

From the outset, the idea of a Reviewer was strongly opposed by the judiciary. As Lord Osborne noted in his evidence to the Justice Committee of the Scottish Parliament, “it is a sorry day if one cannot trust the Lord President to operate complaints procedures correctly”.⁵⁶ Lord McCluskey was equally critical of the idea, warning that it would lead to “time wasting, and giving people the opportunities to mock the judicial system”.⁵⁷ There was even some disagreement amongst parliamentarians about whether or not this additional layer of scrutiny was necessary.⁵⁸ The convener of the Justice Committee, Bill Aitken MSP, described it as akin to “taking a sledgehammer to crack a nut”.⁵⁹

Another argument against the creation of the Reviewer was the fact that disciplinary decisions were already susceptible to challenge through the ordinary procedures of judicial review. It was explained by Lord President Hamilton that:⁶⁰

[I]f, for example, a judge disputed a decision made by the Lord President, he or she would be in a position to challenge it in the Court of Session by way of judicial review if it was contended that the decision was procedurally inept. The same would be true, I think, of a complainant: they would be legally entitled to challenge the matter.

It is suggested that these arguments overlook that transparency is itself an important constitutional value and that the creation of an independent review process promotes openness of decision-making. As noted by the Cabinet Secretary for Justice:⁶¹

[T]he fact that the bill provides for the appointment of a judicial complaints reviewer seems to offer the general public some satisfaction that such matters will be dealt with. That proposal . . . will protect us against the accusation that the system is simply about judges reviewing themselves to protect themselves.

Independence (n 21) para 8.21. An insight into the operation of this system can be found in R Cameron, *Appointment of Queen's Counsel in Scotland 2006/7* (2007, available at <https://www.scotland.gov.uk/Resource/Doc/1098/0052449.pdf>).

⁵⁵ Policy Memorandum (n 21) para 89.

⁵⁶ Scottish Parliament, *Official Report*, Justice Committee, col 592 (18 March 2008).

⁵⁷ Col 636. See also written submission from Sir David Edward (available at <http://www.scottish.parliament.uk/s3/committees/justice/inquiries/JudiciaryBill/JC14.pdf>) para 23. More ambivalent views were expressed by the Lord President (available at <http://www.scottish.parliament.uk/s3/committees/justice/inquiries/JudiciaryBill/JC8.pdf>) 5-6. See also the written submission from the Sheriffs Principal (available at <http://www.scottish.parliament.uk/s3/committees/justice/inquiries/JudiciaryBill/JC5.pdf>) para 3.

⁵⁸ Justice Committee, Stage 1 Report (n 23) para 182.

⁵⁹ Scottish Parliament, *Official Report* col 11275 (25 Sept 2008). See also *Official Report* col 8577 (14 May 2008, Gavin Brown MSP).

⁶⁰ Scottish Parliament, *Official Report*, Justice Committee, col 579 (11 March 2008).

⁶¹ *Official Report*, Justice Committee, col 695 (25 March 2008).

Moreover, the process of reviewing complaints by an ombudsman figure offers significant advantages over judicial review. An ombudsman system is free to access and procedurally uncomplicated whereas judicial review is potentially costly and time-consuming.⁶² Thus, the Judicial Complaints Reviewer is intended to offer a simple and cost-effective procedure for individuals who have been aggrieved by the judicial complaints process. In addition, in terms of perceptions of fairness and impartiality, the courts may not be the most suitable body to review the decisions of the Head of the Scottish Judiciary in relation to judicial discipline. It could also be argued that an independent Reviewer is more likely to be able to identify with the issues raised by a complainant than the Lord President or a judge nominated to conduct an investigation into judicial conduct, both of whom will have spent much of their professional lives on the other side of the bench from the complainant, making it more difficult to be totally impartial. This argument finds support in the annual reports of the Judicial Ombudsman for England and Wales which suggest that one of the most common criticisms of the judicial complaints system in that jurisdiction is that an investigator has accepted the judge's version of the hearing without independent verification.⁶³

For these reasons, it is suggested that a Judicial Complaints Reviewer may improve the system of judicial complaints. Much, however, will depend on the Reviewer's precise powers and functions. It is to this issue that we now turn.

(2) Functions

The principal function of the Reviewer is to investigate individual cases where it is alleged that the prescribed procedures have not been followed. A case can be referred to the Reviewer either by the complainant or by the judicial office holder against whom the complaint was made.⁶⁴ It is made clear by the legislation that the Reviewer has no role in reviewing the merits of a particular investigation, the substantive recommendations that were made by the investigator, or the disciplinary powers exercised by the Lord President.⁶⁵ Rather, the Reviewer's task is restricted to considering whether the investigation was conducted fairly. Fairness in this context obviously includes whether or not the prescribed procedures have been followed, but it could also encompass

62 See B Thompson, "The Scottish Public Services Ombudsman: revolution or evolution?", in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006) 281 at 282.

63 *Judicial Appointments and Conduct Ombudsman Annual Report 2007-08* (available at <http://www.judicialombudsman.gov.uk/docs/annualreport07-08.pdf>) 9-10.

64 Judiciary and Courts (Scotland) Act 2008 s 30(2)(a).

65 Explanatory Notes on the *Judiciary and Courts (Scotland) Bill* (2008, available at <http://www.scottish.parliament.uk/S3/bills/06-JudiciaryCourts/b6s3-introd-en.pdf>) para 70.

broadier questions such as whether or not all aspects of a complaint were properly considered.⁶⁶

If the Reviewer decides that the complaint was not handled according to the prescribed rules and procedures, the case may be referred back to the Lord President.⁶⁷ It would appear that the involvement of the Reviewer ends there as the Reviewer does not have power to quash the outcome of a faulty investigation or to modify the recommendations made in an individual case. On receipt of a referral from the Reviewer, the Lord President may vary or revoke the determination made in the case, confirm the determination, or order a fresh investigation.⁶⁸ The appropriateness of these options will depend upon the circumstances of each case, and the breadth of discretion is made clear by section 33(2)(d) which says that the Lord President may “deal with the referral in any other such way as the Lord President considers appropriate”. There is no requirement to give reasons.⁶⁹ The powers of the Judicial Complaints Reviewer are significantly weaker than those of the Judicial Ombudsman in England and Wales, who can set aside a determination by the investigating authorities if the original investigation is thought to have been unreliable.⁷⁰ In contrast, the Scottish scheme relies upon the willingness of the Lord President to follow the Reviewer’s recommendations. Despite this limitation, however, the existence of an alternative means of questioning the complaints process is clearly to be welcomed. Although the procedure may not offer a substantive remedy, it provides a way for individuals to air their grievances about their treatment at the hands of the Scottish judicial system.

Another function of the Reviewer is to “make written representations to the Lord President about procedures for handling written investigations of matters concerning the conduct of judicial office holders”.⁷¹ This function is concerned not with responding to individual complaints but with suggesting systematic improvements to the operation of the complaints procedure. Representations may be made of the Reviewer’s own accord and do not depend upon a formal complaint being made. At the same time, representations may also

66 This would appear to be how the Judicial Ombudsman in England and Wales has interpreted the Ombudsman’s mandate: see *Judicial Appointments and Conduct Ombudsman Annual Report 2006-07* (available at <http://www.judicialombudsman.gov.uk/docs/annualreportfinal.pdf>) 6.

67 2008 Act s 30(2)(b).

68 2008 Act s 33(2).

69 There is no general duty to give reasons in English or Scots public law, although some commentators have suggested that that such an evolution may not be far off: see e.g. P P Craig, “The common law, reasons and administrative justice” (1994) 53 CLJ 282; C Munro, “The duty to give reasons” 1995 SLT (News) 5.

70 Constitutional Reform Act 2005 s 111(5).

71 2008 Act s 30(2)(d).

be inspired by a complaint or series of complaints which raises a matter of systemic importance.⁷² The powers of the Reviewer are, however, subject to significant limitations. Although the Lord President must take account of written representations by the Reviewer,⁷³ the Act falls short of requiring the Lord President to adopt such recommendations. In other words, the wide discretion enjoyed by the Lord President in designing the procedures for investigating judicial conduct is unaffected by any recommendations from the Reviewer.

Finally, the Reviewer can publish reports on investigations carried out into judicial conduct, subject to directions from the Scottish Ministers.⁷⁴ Such reports are a key part of promoting transparency as they guarantee that information on the overall operation of the judicial complaints system is available in the public domain. This goes some way to make up for the fact that the results of individual investigations may not be made public.⁷⁵

(3) Independence

If the system of oversight created by the Act is to be effective, it is vital that the Judicial Complaints Reviewer is perceived as independent from both the government and the judiciary.⁷⁶ Independence is promoted in part by the provisions in the Act on appointment. The Reviewer is to be appointed by the Scottish Ministers with the consent of the Lord President.⁷⁷ Their selection, however, is limited by section 30(5), which disqualifies from appointment any member of the House of Commons, the Scottish Parliament or European Parliament as well as Ministers of the Crown, members of the Scottish Executive, civil servants, judicial office holders, and solicitors, advocates or barristers, whether practising or not. In other words, the Reviewer is to be detached from both government and the legal establishment.

Other features of the Act could be perceived as potentially undermining independence and impartiality. Section 32 requires that “the Judicial Complaints Reviewer must comply with any guidance that the Scottish Ministers issue about the carrying out of the Reviewer’s functions”. Guidance can relate to any of the functions of the Reviewer described above. It might, for example, specify additional conditions which must be met before the Reviewer can undertake a particular investigation. This would therefore seem to be a broad power to direct

⁷² See *Judicial Appointments and Conduct Ombudsman Annual Report 2007-08* (n 63) 10.

⁷³ 2008 Act s 30(4).

⁷⁴ 2008 Act s 30(2)(c).

⁷⁵ See D above.

⁷⁶ See *Judicial Appointments and Conduct Ombudsman Annual Report 2006-07* (n 66) 12.

⁷⁷ Judiciary and Courts (Scotland) Act 2008 s 30(1).

the conduct of the Reviewer in relation to all of his or her functions.⁷⁸ This power can be contrasted with the position under the legislation creating the Scottish Public Services Ombudsman:⁷⁹

The Ombudsman, in the exercise of that officer's functions, is not subject to the direction or control of –

- (a) any member of the Parliament,
- (b) any member of the Scottish Executive
- (c) the Parliamentary corporation.

While the informal status of the Reviewer means that it may sometimes be appropriate for the Scottish Ministers to provide guidance, they should be cautious in exercising this power so that they do not undermine the Reviewer's perceived independence.

It is desirable that the Reviewer has a degree of institutional independence. In his first report, the Judicial Ombudsman in England and Wales stressed the importance of separate secure office accommodation, a separate budget, and separate and secure records systems.⁸⁰ For this purpose, the Ombudsman has entered into a Memorandum of Understanding with the Ministry of Justice setting out their respective roles and responsibilities, the arrangements to be made by the Ministry to provide assistance to the Ombudsman, and the manner in which their relationship should be conducted.⁸¹ In relation to the Scotland, it is unclear what arrangements will be made to support the work of the Reviewer. It is certainly preferable that the Reviewer is supported by civil servants working within the Scottish Government, as opposed to civil servants from the Scottish Court Service as was proposed during the preparation of the legislation.⁸² The latter option would undermine the perceived impartiality of the Reviewer, as the Lord President will be the Chair of the newly reformed Scottish Court Service and the judiciary will control the distribution of its resources.⁸³ Following the practice in England and Wales, a Memorandum of Understanding might assist in promoting independence by guaranteeing that the Reviewer has access to the required resources.

⁷⁸ The Scottish Ministers must consult the Lord President over any guidance and it must be published.

⁷⁹ Scottish Public Services Ombudsman Act 2002 Sch 1 para 2(2).

⁸⁰ *Judicial Appointments and Conduct Ombudsman Annual Report 2006-07* (n 66) 12.

⁸¹ See *Judicial Appointments and Conduct Ombudsman Annual Report 2007-08* (n 63) 13; *Memorandum of Understanding between the Ministry of Justice and the Judicial Appointments and Conduct Ombudsman* para 1.

⁸² Policy Memorandum (n 21) 89.

⁸³ 2008 Act s 60, Sch 3 para 2.

F. SUBSTANTIVE RULES OF JUDICIAL CONDUCT?

The 2008 Act largely deals with the procedural aspects of investigating complaints, and does not define what is meant by misconduct or misbehaviour. The 2006 consultation paper stated that “what is inappropriate conduct in a particular case is a matter that we consider should be left to the senior judges to determine”.⁸⁴ This is in line with the Latimer House Guidelines, an instrument endorsed by Commonwealth Heads of Government in December 2003,⁸⁵ which says that “a code of ethics and conduct should be developed and adopted by each judiciary as a means of ensuring accountability of judges”.⁸⁶ Such steps have already been taken in England and Wales through the promulgation of a Guide to Judicial Conduct by the Judges’ Council.⁸⁷ This follows the six values of judicial conduct found in the Bangalore Principles of Judicial Conduct,⁸⁸ namely judicial independence, impartiality, integrity, propriety, equality, and competence and diligence. The Guide elaborates on each in a separate chapter, whilst recognising that “there is a substantial overlap between the principles relevant to the application of the values”.⁸⁹ There is also guidance on particular issues such as contact with the media,⁹⁰ participation in public debate, commercial activities, involvement in community organisations, and the receipt of gifts and hospitality.⁹¹ This document is not intended to be a rigid set of rules with which judges must comply, and it makes clear that “the primary responsibility for deciding whether a particular activity or course of conduct is appropriate rests with the individual judge and [the Guide] is not intended to be prescriptive, unless stated to be”.⁹²

Despite their informal status, there are significant advantages to producing guidelines on judicial conduct. Although there is no formal link between the Guide to Judicial Conduct and the system for judicial complaints, the Guide

⁸⁴ Scottish Government, *Strengthening Judicial Independence* (n 21) para 8.4.

⁸⁵ *Commonwealth (Latimer House) Principles on the Three Branches of Government* (available at http://www.cpahq.org/uploadedFiles/Information_Services/Publications/CPA_Electronic_Publications/Latimer%20House%20Guidelines.pdf). The Guidelines are not a treaty and therefore are not binding. Nevertheless, they have had some influence on developments in Commonwealth countries.

⁸⁶ *Commonwealth (Latimer House) Principles* (n 85) para V.1(a).

⁸⁷ *Guide to Judicial Conduct*, 2nd supplement (2008, available at http://www.judiciary.gov.uk/docs/judges_council/judicialconduct_update0408.pdf).

⁸⁸ *Bangalore Principles on Judicial Conduct* (2002, available at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf), approved by the United Nations Commission on Human Rights in 2003 (resolution 2003/43).

⁸⁹ *Guide to Judicial Conduct* (n 87) para 1.6.3.

⁹⁰ In this regard, the Guide makes reference to *The Media: a Guide for Judges*, first published in July 2000 by the Lord Chancellor’s Department. Previously, the issue had been dealt with by the so-called Kilmuir rules: see J A G Griffith, *The Politics of the Judiciary*, 5th edn (1997) 42-45.

⁹¹ *Guide to Judicial Conduct* (n 87) ch 8.

⁹² *Guide to Judicial Conduct* (n 87) para 1.6.2.

provides an indication of the standards of behaviour that can be expected from the judiciary. Moreover, its publication offers the potential for a broader debate about standards of judicial conduct. Indeed, such public debate may in itself provide a means for promoting accountability of the judiciary without encroaching on the principle of judicial independence. As noted by the Latimer House Guidelines, “legitimate public criticism of judicial performance is a means of ensuring accountability”.⁹³

It has been reported that work on a code of judicial conduct is already underway by the Judicial Council formed by the Scottish judiciary in 2007.⁹⁴ It is to be hoped that any code of conduct ultimately produced will be made public so that it can be subjected to legitimate scrutiny and debate.

G. CONCLUSION

Whilst the primary aim of the 2008 Act was to strengthen judicial independence, the legislation also goes some way to promoting accountability of the judiciary, in particular through the introduction of a statutory scheme of judicial conduct and discipline. In this regard, the Act is to be welcomed, and the contention that the reforms are merely “empire-building quangoism”⁹⁵ is not convincing. In a modern democracy, it is difficult to defend the proposition that the judiciary should not be subject to some form of independent scrutiny. Indeed, the need for accountability is arguably greater given the prominent role that judges now play in key constitutional issues under human rights legislation and the devolution settlement. At the same time, accountability must also be balanced against the principle of judicial independence.

It will only be possible to make a full assessment of the extent to which the Act has been successful in balancing these values when there is further experience of implementation. Nevertheless, the Act has already made substantial progress in promoting transparency by requiring the publication of the rules and procedures which apply to the judicial complaints process. Transparency is further promoted through the creation of a Judicial Complaints Reviewer to monitor the operation of the scheme. At the same time the Act gives considerable weight to the principle of judicial independence. The Lord President continues to have an

93 *Commonwealth (Latimer House) Principles* (n 85) para V.2(b). See also Judiciary of England and Wales, *The Accountability of the Judiciary* (2007, available at <http://www.judiciary.gov.uk/docs/accountability.pdf>). See also Styles (n 14) at 193.

94 Written submission of the Lord President to the Justice Committee (available at <http://www.scottish.parliament.uk/s3/committees/justice/inquiries/JudiciaryBill/JC8.pdf>).

95 McCluskey (n 22) at 293.

almost complete discretion in designing a system for judicial complaints, and the powers of the Judicial Complaints Reviewer are weak. This analysis is confirmed by a comparison with the scheme under the Constitutional Reform Act 2005 which appears to create more robust mechanisms of accountability in relation to the English judiciary.

Despite its weaknesses, the 2008 Act has taken a valuable step in instigating public debate on the topic of judicial discipline. It is hoped that the Act will prompt further discussion over the standards of conduct that we expect from our judicial office holders.